82-1368

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term 1982

MELVIN COOPER,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MELVIN COOPER
Petitioner Pro Se
P.O. Box 1000 D4
Montgomery, PA 17752

(13579)

QUESTIONS PRESENTED

1.Wherein determining sentence and length of incarceration the trial court employed Parole Commission guidelines, and where after incarceration the Parole Commission applied guidelines which differed and increased the petitioner's length of incarceration so that the sentencing court's intentions were frustrated, was the appellant deprived of due process where on a motion to modify sentence pursuant to Rule 35 of the F.R. Cr. Pr. the court denied an application to modify the sentence so as to confirm to the court's original intention.

2.Where the trial court conceded that its sentencing intentions were frustrated by the Parole Commission was the refusal of the sentencing Judge to modify the appellant's sentence a violation of due process in that the petitioner's length of incarceration was

thereby increased.

3. Where the petitioner was sentenced on the basis of erroneous information was it a denial of due process for the sentencing Court to refuse to correct the sentence.

4. Where on timely application to the trial court for relief pursuant to Rule 35 of the F.R.Cr. Pr. the court reviews the appellant's plea and sentencing de novo, including the post-sentencing determination of the Parole Commission to impose a higher guideline increasing the length of appellant's incarceration, was the court's sanctioning of the increased period of incarceration a re-sentencing to a harsher term, depriving the appellant of due process.

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1982
NO.

MELVIN COOPER,
Petitioner

-against-

UNITED STATES OF AMERICA,
Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES :

Your petitioner, MELVIN COOPER, respectfully prays that a writ of certiorari issue to review a determination of the United States Court of Appeals For the Second Circuit, rendered on November 16, 1982, which denied a rehearing of a determination made on September 22,1982, denying an application for relief pursuant to Federal Rules of

Criminal Procedure 35.

Your petitioner, who appears here pro se has been incarcerated since April 10,1981. The petitioner was sentenced to a total of six years and committed fines totalling $20,000 and two years special parole on a plea of guilty to four counts charging violations of Title 18 U.S.C. 1952, Title 21 U.S.C. sections 841(a)(1) and (b)(1)(B) and 26 U.S.C. section 7206(1). Sentence was imposed by District Judge Leonard B. Sands, S.D.N.Y.

OPINION BELOW

The opinion of the United States Court of Appeals is annexed herein as Appendix "A", infra at p.

The opinion of the District Court is annexed herein as Exhibit B, infra at p.

JURISDICTION

The determination and order of the Court of Appeals was entered September 22,1982. A petition for rehearing en banc was denied November 16,1982, without opinion.

Jurisdiction herein is invoked under Title 28 U.S.C. section 1254(1). The basis for federal jurisdiction below in the United States District Court was Title 18 U.S.C. section 1952,Title 21 U.S.C. sections 841(a)(1) and (b)(1)(B) and 26 U.S.C. section 7206(1) and Rule 35 Federal R. Crim. Procedure.

STATUTES INVOLVED

The statute involved in Rule 35(b) of the F.R. of Cr.Pr., the pertinent provisions of which are set forth in Appendix "C" infra at p.

STATEMENT OF THE CASE

In January of 1981, the appellant and several others were indicted in the

Southern District of New York. The appellant pled guilty to a violation of Title 18 U.S.C. section 1952, 21 U.S.C. sections 841(a)(1) and (b)(1)(B) and Title 26 U.S.C. 7206 (1), and was sentenced to consecutive terms of two two year terms and two one year terms (total of six years) and committed fines of $5,000 each count, and two years special parole.

At the time of sentencing there was in effect a severity of offense guideline in which was indicated the range of incarceration for various offenses. This guideline ranged from "low" through "moderate", "high" "very high","greatest one" and "greatest two". The pre-sentence investigation report which was before the sentencing judge and upon which the appellant's sentence was based placed the appellant in the "very high"

classification which provided for a range of incarceration of 24-36 months. The Parole Commission designated the appellant as "greatest one" which provided for a range of 40-52 months and directed appellant serve 46 months. On the Rule 35 sentencing hearing the trial judge (Sands,D.J.) stated, with respect to the above :

> It is the craziest system. There is no rationality to it at all. The Court imposes a sentence after receiving a presentence report and then the Parole Commission, in effect, resentences. There is no way that I can be satisfied, based on my observations of the system, that it is a system which makes any sense.

The District Judge after reviewing de novo the entire record of the proceedings "from the time of the entry of the plea to sentencing..in the light of the increased severity guidelines " concluded that the petitioner's offense merited the additional incarceration period.

The Court of Appeals in affirming the District Court noted that while the district court had reviewed "the entire record in the light of the increased severity guidelines" concluded that the reasons which prompted the sentence continue to be determinative.

REASONS FOR ALLOWANCE OF WRIT

The record clearly shows that the Probation Department in the preparation of the petitioner's pre-sentence investigation report to the sentencing Judge provided him with Parole Commission guidelines indicating an offense severity rating providing for a minimum incarceration of 24 months and a maximum of 36 months. The Court then gave the petitioner a six year sentence by multiplying the minimum incarceration period by three (equaling 72 months). This was done in the light of Title 18

U.S.C. section 4205(a) which provided that in the imposition of adult sentences the minimum incarceration required would be one-third of the sentence. Thus on a six year sentence the petitioner would be required to serve a minimum of 24 months before consideration for parole.

It is evident that the original intentions of the sentencing court were frustrated by the actions of the Parole Commission, or alternatively that the sentencing court was provided with erroneous guideline informations. For all practical considerations the sentence of the petitioner has been increased from six years to ten years since his minimum incarceration period was raised to 40 months. The sentencing court recognized this in considering de novo the action from plea to sen-

tence and concluding that the petitioner's offense merited the extra time. This effective resentencing was impermissible and violated the petitioner's due process rights.

On the petitioner's Rule 35 hearing the sentencing Court remarked :

> The original concept was that a Parole Board would have had an opportunity to consider and review the defendant's adjustment to prison and rehabilitation and make some judgment based on these factors. The way the system operates now, the Parole Commission, with the same material before it as was before the Court, in effect determines the practical consequences of the Court's sentence (A-101)

The case before this Court is similar to United States v Slutsky, 514 F. 2d 1222 (2nd Cir. 1975). In Slutsky the defendant was sentenced under the provisions of Title 18 U.S.C. 4208(a)(2)(1970)which provided that the sentencing judge might specify that the

defendant be eligible for parole at such time as the Board of Parole may determine, thus making the defendant immediately eligible for parole. The Board of Parole disregarded these sentence instructions and did not consider parole until at least one third of the sentence was served. The Court of Appeals vacated the sentence of the defendant, reversing the district court's denial of a Rule 35 motion and directed resentencing. The Court stated :

> We are convinced that the parole consideration afforded the Slutskys is likely to depart substantially from what we must assume were the reasonable expectations of the district judge (p.1227)

The sentencing court provided a two year special parole of the petitioner to follow his regular sentence (which includes a parole period), a sentencing period which the court consider-

ed actual incarceration at a maximum of 36 months. This incarceration period was based upon the information supplied the trial judge at the presentence investigation. Whether the Parole Commission was correct as to its determination of the petitioner's offense severity rating is irrelevant. The court on the motion of the petitioner made under Rule 35 had simply to reduce the sentence of the petitioner to conform to its original intent i.e. to 4 years and 6 months. This would have provided the maximum incarceration of 36 months followed by periods of parole and special parole. As was stated in Slutsky, cited supra at 1229 :

> (T)he parole implications of a sentence are a necessary and important factor for the consideration of the sentencing judge. And, when, as here, there has been a timely motion for reduction of sentence, and the

mistake is easily rectified by providing for resentencing, the interests of justice mandate such a procedure.

Such a procedure as was mandated by the Court in Slutsky was equally applicable here. Indeed, here, the district judge reviewed the record "from the time of the entry of the plea to sentencing de novo in the light of the increased offense severity guidelines" (A-122) and in permitting the sentence to stand, denying relief pursuant to Rule 35 F. R. Crim. Pr. the Court in effect imposed a harsher sentence upon the petitioner than that to which he was originally sentenced. This was violative of petitioner's due process rights.

CONCLUSION

This case is one wherein the petitioner has been denied relief under circumstances indicative of deviation from established law. It is further clear

that the within application presents a meritorious, novel and certainly arguable question of a kind likely to arise again and which calls for authoritative disposition by this court.

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed and that your petitioner be granted such other, further and different relief as may seem proper.

Dated: Montgomery Pennsylvania
February 1, 1983

MELVIN COOPER
Petitioner
Pro Se
P.O. Box 1000 D4
Montgomery Pa.17752

CERTIFICATION

STATE OF PENNSYLVANIA }
COUNTY OF LYCOMING } SS:

MELVIN COOPER states pursuant to Title 28 U.S.C. section 1746 and the penalties for perjury therein contained as follows :

That he is the petitioner herein; that he has read the foregoing petition and the same is true to his own knowledge except as to such matters as is stated on information and belief and as to those matters believes the same to be true.

That he verily believes that the foregoing petition is meritorious and states that it is not submitted for any purpose of delay.

Dated: Montgomery Pa.
February 1, 1983

MELVIN COOPER

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of SEPTEMBER , One Thousand Nine hundred and Eight-two.

PRESENT: HON. WALTER R. MANSFIELD,
Circuit Judge
HON. ELLSWORTH A. VAN
GRAAFEILAND, Circuit Judge
HON. JON. O. NEWMAN,
Circuit Judge

UNITED STATED OF AMERICA,

Plaintiff-Appellee

v.

MELVIN COOPER,

Defendant-Appellant.

Melvin Cooper appeals from an order of the United States District Court for the Southern District of New York,

Sand. J., which denied appellant's Rule 35 motion for reduction of his sentence. Appellant contends that reduction was required because the parole board had re-evaluated the severity rating of his offenses subsequent to his sentencing so as to substantially extend the parole relase guidelines believed to be applicable at the time of sentencing.

The district court reviewed the entire record in the light of the increased offense severity guidelines and concluded that the reasons which prompted the sentence "continue to be operative and. . . determinative." Finding no error, we affirm. Se: United States v. Slutsky, 514 F.2d 1222 (2d Cir.

1975); Dioguardi v. United States, 587 F.2d 572 (2d Cir. 1978).

/s/

Hon.Walter R. Mansfield

/s/

Hon.Ellsworth A. Van Graafeiland

/s/

Hon. Jon O. Newman

Circuit Judges

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of November, one thousand nine hundred and eighty-two.

No. 82-1057

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

MELVIN COOPER, PETER GEOGHEGAN, MICHAEL CARROLL,

Defendants,

MELVIN COOPER,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard

in banc having been filed herein by counsel for the defendant-appellant Melvin Cooper, pro se.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by:

/s/
Francis X. Gindhart
Chief Deputy Clerk

APPENDIX B

A-118

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 CRIM 0015 (LBS)
OPINION #52725

UNITED STATES OF AMERICA,

-against-

MELVIN COOPER, et al.,

Defendant.

APPEARANCES: (See last page)

SAND, J.

Melvin Cooper's motion for reduction of senteence under Rule 35 is presently before the Court. For the reasons set forth herein, the motion is denied.

On April 10, 1981, after considering the presentence report of the probation department, the Government's

sentencing memorandum, the extensive submissions of the defendant and after a detailed allocution of the defendant, the Court imposed sentences on the four counts to which the defendant pled guilty. These sentences were consecutive and the total term was six years, a fine of $20,000 (committed) and the two year mandatory special parole term.

At the time of sentencing, the Court had before it a presentence report which stated that the "Estimated Parole Release Guidelines" indicated an "Offense Severity Rating" of "Very High" and a "Parole Release Guideline Period" of 24 to 36 months.

Immediately after imposition of sentence, defendant's counsel requested that the sentence be imposed under § 4205(b)(2) and the Court responded

(Tr. 47):

> "I leave the question of parole to the Parole Commission in application of its usual criteria, which I have taken into consideration in the sentence I have imposed."
>
> The following colloquy then took place:
>
> "Mr. Katz: I would like to ask you Honor to make a determination as to parole with respect to sixty days, so when I come back before the Court for a reduction of sentence under Rule 35, your Honor will know what the Parole Board guidelines are.
>
> Mr. Sudler: We know that already.
>
> Mr. Katz: I have spoken to Probation. That is subject to change. They are not bound by the twenty-four to thirty-six month guideline that we presently have.
>
> The Court: I really thing that the Court should not, absent compelling circumstances, deal with the operation of the Parole Commission."

Tr. 47-48.

On April 16, 1981, this matter was again addressed on the return of an order to show cause procured by the defendant.

Counsel for Mr. Cooper stated:

> "My understanding from what your Honor stated is, you want the Parole Board to have complete discretion as to when Mr. Cooper should come up for parole and when he should be released.
>
> The Court: I want them to follow their normal procedures. What I meant to indicate, and I have not had the benefit of seeing that transcript, I did not see any reason to indicate to the Parole authorities that the Court had any view or opinion to cause it to deal with Mr. Cooper in any manner other than that which it normally follows."

Later in these proceedings, the following colloquy took place in connection with defendant's counsel's continued urging that a sentence be imposed which would enable Cooper's

release on parole prior to service of one-third of his sentence, i.e., under § 4205(b)(2):

> "Mr. Katz: Yes; that it will be solely up to the discretion of the Parole Board when he will be released.
>
> The Court: I think as I also said at the time of initial sentencing, the sentence which I have imposed is a sentence imposed in awareness of the usual guidelines and the usual procedures. I see no reason why the Parole Board should regard Mr. Cooper as being immediately eligible for Parole."

Tr. 55.

The event which most immediately precipitates this motion is that the Parole Commission, after reviewing Cooper's case, issued the following Notice of Action:

> "Your offense behavior has been rated as Greatest I severity because your instant offense behavior involved coercion

(employing minor female) to cause at least one woman to perform acts of prostitution. Your salient factor score (SFS-81) is 10 (see attached). You have been in custody a total of 6 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 40-52 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted. As required by law, you have also been scheduled for a statutory interim hearing during April 1983."

Cooper objects to this procedure on a number of grounds. First, he alleges that the Court imposed sentence with an explicit awareness of the guidelines established for the defendant and that the subsequent upward revision of these guidelines is in effect a Parole Commission resentencing. Second, he urges that the reason stated for the

increase in his offense severity rating "(coercion (employing minor female))" is not an offense to which he pled guilty, that the minor involved is unkown to him and that he had no role in the hiring of the prostitutes employed at the several brothels he owned and operated. Finally, he urges that the sentence imposed is disparate to sentences generally imposed in prostitution cases and disparate to the sentences imposed on alleged organized crime figures. The Government had sought Cooper's cooperation in the prosecution of these persons alleged to have engaged in extortion from brothels and his refusal to cooperate was cited by the Government at the time of sentencing.

The Government strenuously resists the motion and urges that this Court

should not sit in review of the Parole Commission's action. The Government notes that Cooper has not pursued his administrative right to appeal the action of the Parole Commission. Finally, the Government urges that the sentence imposed was an appropriate one which has had salutory deterrent consequences, was warranted in the light of Cooper's offenses and was not disparate (noting that special consideration set forth in sealed documents were factors in the sentence to which Cooper refers).

We perceive this motion to be directed entirely to the Court's discretion. There is no question that the sentence imposed was lawful and that the action taken by the Parole Commission was within its power. Numerous decisions uphold the lawfulness of these precedures.

The matter of the alleged coercion of the minor was not a newly injected extraneous consideration. The Assistant United States Attorney made pointed reference to the allegation at the time of sentencing. The charge is not one which, in this Court's view, qualitatively alters the nature of the charges against Cooper (unlike, for example, a charge that a single car theft was part of an organized crime ring).

We will not engage in the argument concerning whether this Court would be reviewing the decision of the Parole Commission or whether the Parole Commission, in essence, served as a reviser of this Court's sentence. Nor, most emphatically, will we engage in a defense of the present sentencing and parole procedures. The alleged deficiencies

in logic and equity of the present practices are now before the Congress as they have been for some time.

Rather, what we have done is to review the entire record from the time of the entry of the plea to sentencing de novo in the light of the increased offense severity guidelines and all of the factors now know to the Court (including especially the urgent pleas of Dr. Goldberg).

The reasons which impelled our initial sentence continue to be operative and, in our view, determinative. The magnitude, duration and destructiveness of Cooper's activities are fully set forth in the record. His efforts to condone his conduct and cast himself in the role of a beneficient protector of his prostitutes is a pathetic romanticization of his actions.

If the sentence imposed is not in line with those normally imposed in routine state prosecutions for prostitution, the short answer is that this Court did not, and does not perceive this to be such a case but rather one involving serious, widespread and prolonged criminality.

Mr. Cooper persists in viewing himself as the victim rather than the victimizer and the time has long past for him to come to grips with reality. The Court feels compassion for his family who suffer perhaps even more severely than Cooper himself from his incarceration. They too are victims. We have considered, as noted, the medical reports which have been submitted. On balance, we nevertheless

feel constrained to adhere to our previous sentence and hope that when Mr. Cooper is released and returned to him family, he will be able to lead a useful and productive life.

Motion denied.

SO ORDERED.

Dated: New York, New York
February 5, 1982

/s/
U.S.D.J.

Appendix C

Rule 35 Correction or Reduction of Sentence

(a) Correction of Sentence -
The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence -
The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.